SHARTSIS FRIESE LLP
ZESARA C. CHAN (Bar #136302)
TRACY A. DONSKY (Bar #197114)
One Maritime Plaza, 18th Floor
San Francisco, California 94111-3598
Telephone: (415) 421-6500
Facsimile: (415) 421-2922

Attorneys for Defendants
MARTINDALE-HUBBELL AND
LEXIS/NEXIS, divisions of
REED ELSEVIER, INC.

UNITED STATED DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

INHERENT.COM aka INHERENT, INC. Plaintiff, v. MARTINDALE-HUBBELL, LEXIS/NEXIS INC. and DOES 1 through 200 inclusive, Defendants.	No. C 05 3515 MHP **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO TRANSFER PURSUANT TO 28 U.S.C. § 1404** Date: October 31, 2005 Time: 2:00 p.m. Courtroom: 15 Judge: Honorable Marilyn H. Patel Complaint Filed: July 29, 2005

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Defendants Martindale-Hubbell ("MH") and Lexis/Nexis ("Lexis"), divisions of Reed Elsevier Inc. ("Reed Elsevier") (collectively, "Defendants") respectfully submit this reply memorandum in response to plaintiff Inherent, Inc.'s ("ICI") opposition to Defendants' Motion to Dismiss or in the Alternative, to Transfer this Action to the District of New Jersey, where another action involving the same parties and same facts is pending (the "New Jersey Action").

I. INTRODUCTION

There is no compelling reason to reject the "first to file" doctrine and keep this action in California. ICI does not dispute that the underlying facts of this action have no connection whatsoever with California. ICI does not and cannot point to even one event giving rise to this action that occurred in California – not one phone call, email, letter or meeting. Indeed, ICI does not deny that it had a decade-long marketing relationship with MH which resulted in ICI's executives having numerous contact with MH in New Jersey, making 40 visits to New Jersey, or that ICI sent approximately 100 communications (by phone, email or otherwise) to MH's New Jersey office during discussions about the proposed acquisition deal which is at the crux of this case. ICI admits that communications regarding the acquisition "went both ways," to and from New Jersey and Oregon, and that ICI continues to do business with MH. Based on these uncontroverted facts, there is no doubt that this case is properly venued in New Jersey because a substantial part of the events giving rise to ICI's claims occurred in New Jersey. In fact, in the New Jersey Action, the United States District Court for the District of New Jersey has determined that there is no justification for ignoring the "first to file" rule in this instance. See Supplemental Request for Judicial Notice ("Suppl. Req. Jud. Notice"), submitted concurrently herewith, Exh. E at 5-7 (October 13, 2005 decision of the Honorable Ronald J. Hedges).

Because of New Jersey's deep connection to the facts of this dispute, ICI faces an insurmountable task in trying to keep this case in California and close to its San Francisco counsel. In its desperation to avoid litigating this case in New Jersey, ICI attempts to manufacture the false impression that it relocated to California before the New Jersey Action (and the subsequently filed California action). As the United States District Court for the District of New Jersey noted in its decision refusing to dismiss or transfer the case filed in New Jersey by Reed Elsevier, "Inherent's

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relocation appears to be no more than an ingenious 'forum shopping' attempt," and "[t]here is no connection to or relation between Inherent and California." [Suppl. Req. Jud. Notice, Exh. E at 7.] ICI's procedural arguments for opposing Defendants' present motion rely heavily on the self-serving and conclusory declaration of Debra Kamys and a California Business Registration Certificate ("Business Certificate") issued to ICI on August 23, 2005, several weeks after both the New Jersey and the present action were filed. The Kamys Declaration and Business Certificate highlight the questionable validity of the bona fides of ICI's purported relocation to California. Under ICI's Business Certificate, ICI's address is coincidentally the same as that of ICI's San Francisco counsel, the Catalano firm. Moreover, the Kamys Declaration fails to allege any facts showing that ICI moved its "principal place of business" to California in early July or is conducting any business in California. If ICI has indeed moved its principal office to San Francisco, as ICI claims, it is hard to imagine why its own website continues to show only a Portland, Oregon address and ICI has no California telephone number.

Even assuming ICI's presence in California, and in the alternative to dismissal of this action, the balance of public and private factors favors transfer of this case to New Jersey as the United States District Court for the District of New Jersey has concluded. [Suppl. Req. Jud. Notice, Exh. E at 5-7.] "Other than the uncertain claim that California is the state of Inherent's residence, California has no other interest or relation to the events giving rise to the dispute." [Id. at 7.] At best, ICI has two witnesses, Ms. Kamys and her husband, who purport to reside in California. MH has at least 12 witnesses that are located in New Jersey and a vastly greater amount of documents are located there. While New Jersey is in close proximity to the operative events, California is not. ICI's choice of forum should be accorded little or no weight where none of the underlying events occurred here. For the reasons stated in Defendants' opening papers and below, Defendants' motion to dismiss this action therefore should be granted.

II. NO JUSTIFIABLE REASON EXISTS FOR THE COURT TO IGNORE THE WELL-SETTLED "FIRST-TO-FILE" DOCTRINE

The "first to file" doctrine should "not be disregarded lightly." Church of Scientology of Calif. v. United States Dep't of Army, 611 F.2d 738, 750 (9th Cir. 1979). The rule is designed to

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foster the sound goal of judicial efficiency and to avoid conflicting judgments. Id. ICI has failed to assert any compelling reason to reject the well-established "first to file" rule.

Although ICI suggests that the "first to file" doctrine should not apply if "forum shopping alone" motivated the choice of forum for the first-filed action, neither authority cited by ICI supports the application of that exception in this matter. [ICI Opposition Memorandum ("Oppos. Br.") at 6.] In both cases cited by ICI, Mann Mfg., Inc. V. Hortex, Inc., 439 F.2d 403 (5th Cir. 1971) and Mattel, Inc. V. Louis Marx & Co., 353 F2D 421 (2nd Cir. 1965), the courts consistently applied the "first to file" doctrine by ruling that the first-filed case should proceed and the second-filed case should not.[1] Regardless of these inapposite authorities, any allegation of forum shopping by Reed Elsevier is not warranted here. New Jersey is a legitimate forum for the parties' dispute not only because MH is located there, but because the underlying facts of this action have a close nexus to New Jersey. Ironically, and as the New Jersey court has already concluded, it is ICI which appears to be the party engaged in forum shopping. The Declarations submitted by Ms. Kamys in the New Jersey action suggest that the supposed relocation of ICI to California is a ruse purely to support its efforts to venue the case in California -- where Ms. Kamys's uncle, Patrick Catalano, would be able to conveniently handle the case -- as the United States District Court for the District of New Jersey has so noted. [See Suppl. Req. Jud. Notice, Exh. E at 7.] Moreover, outward indications support the conclusion that ICI's business is still operating from Oregon and that it is not doing any business from California. [See Supplemental Declaration of Fernando Marinez ("Suppl. Marinez Decl.") submitted herewith, ¶¶ 3-4, Exh. A.]

From beginning to end, the core of this dispute involved actions taken in or communications sent to New Jersey. [See Defendants' Opening Memo ("Open Br."), Section IV(A) at pp. 11-12.] As ICI's own Complaint alleges, the parties' discussion began in July or

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[1] In Mann Mfg., Inc. V. Hortex, Inc., 439 F.2d 403 (5th Cir. 1971), the first suit involving the disputed patents was filed in the Southern District of New York and the second was filed in federal court in Texas. The Fifth Circuit reversed the district court and directed it to transfer the second action filed in Texas to the Southern District of New York or to dismiss the second action. Id. at 408. Likewise, in Mattel, Inc. V. Louis Marx & Co., 353 F. 2d 421 (2nd Cir. 1965), the Second Circuit remanded the case to the district court with instructions to stay the second action filed in the Southern District of New York until the first action filed in New Jersey terminated. Id. at 424 ("We see no reason … which would justify the staying of the first brought action in favor of the action which was second brought.").

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August 2004, when ICI first contacted MH in New Jersey.[2] [Compl., Exhibit A (Letter dated July 13, 2005) at 1; Declaration of Timothy Corcoran ("Corcoran Decl."), ¶ 14; Declaration of Michael Little ("Little Decl."), ¶ 4.]. As part of discussions about a potential acquisition deal, the parties entered a Nondisclosure Agreement expressly governed by New Jersey law. [Little Decl., ¶ 5 and Exh. A.] The Letter of Interest at the crux of this dispute was drafted in New Jersey at MH's offices, physically tendered to ICI in New Jersey, signed by ICI and sent back to New Jersey. [Little Decl., ¶¶ 7-16 and Exh. C.] The negotiations were terminated by MH in New Jersey. [Little Decl., ¶ 12.] ICI does not dispute that there were approximately 100 communications by email and telephone regarding the possible acquisition between the companies, and in fact concedes that "[c]ommunications regarding the acquisition of ICI by MH went both ways," both to and from New Jersey and Oregon. [Oppos. Br. at 4.] Likewise, ICI admits that ICI traveled to New Jersey at least once "with respect to the facts" at issue. [Oppos. Br. at 3.] Based on the many significant events related to the present claims which occurred in New Jersey, and the fact that MH and most of its witnesses in this matter are located there, New Jersey was and is a logical and proper venue to adjudicate the parties' dispute.

ICI's contention that the first to file rule should be rejected here, on the purported basis that otherwise the Court would be discouraging the informal resolution of disputes, is neither supported in the law nor grounded in common sense. [Oppos. Br. at 6]. ICI cites no authority to support this novel proposition. ICI seems to suggest that by sending a demand letter to MH, ICI somehow secured the exclusive right to choose when, where, and by which party the lawsuit could be brought. Applying ICI's views would lead to a policy that the first counsel who sends a demand letter to an opposing party would thereby control the forum for the suit and preserve for itself the right to be the plaintiff in the action. This is nonsense. Each side of a controversy is entitled to seek resolution of the dispute, including, as Reed Elsevier here, filing suit to determine its rights and obligations to ICI, if any.

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2 Although ICI attempts to claim that "negotiations" were instigated by MH (Opp. Br. At 2), ICI's own complaint belies this claim. ICI's complaint alleges that "LexisNexis Martindale-Hubbell…was approached by Debra Kamys of Inherent.Com, Inc. … about an acquisition." [See Exhibit A to its Complaint (letter dated July 13, 2005), at p. 1.]

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In its opposition, ICI also attempts to argue that the issues in both cases are not the "same." [Oppos. Br. at 6]. In evaluating whether the "first to file" doctrine should be invoked, courts looks to the "similarity of the issues at stake" and the likelihood that there is "substantial overlap" in the substantive issues that will arise in both actions. Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 625 (9th Cir. 1991) (discussing the "similarity of the issues at stake"). Here, there is substantial overlap of the same issues in both cases. Both cases seek equitable relief and a declaration of rights and obligations between the parties under the non-binding Letter of Interest, if any. Whether ICI's claims in California are framed in tort or contract, in equity or at law, the facts underlying both actions arise from the same events and circumstances surrounding the proposed acquisition of ICI, termination of negotiations, and Defendants' alleged misuse of ICI's supposed "trade secrets." "The [first-to-file] rule does not, however, require that cases be identical. The crucial inquiry is one of 'substantial overlap' . . . [and] regardless of whether or not the suits here are identical, if they overlap on the substantive issues, the cases would be required to be consolidated in . . . the jurisdiction first seized of the issues." Save Power v. Syntek Fin. Corp, 121 F.3d 947, 951 (5th Cir. 1997) (citations and quotations omitted); Nakash v. Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989) ("It is enough if the two proceedings are substantially similar."). Because there is a substantial overlap in the facts and issues relevant to both actions, the fact that the California action may also seek damages in addition to declaratory relief is not grounds for rejecting the "first to file" doctrine.

III. VENUE AND PERSONAL JURISDICTION OVER ICI IS PROPER IN NEW JERSEY.

In the first-filed New Jersey Action, ICI filed a motion to dismiss for improper venue and lack of personal jurisdiction. On October 13, 2005, the Honorable Ronald J. Hedges, U.S.M.J., denied ICI's motion and in the process determined that the dispute between the parties should be adjudicated in New Jersey (and not in either California or Oregon). As a matter of judicial economy and to avoid the possibility of inconsistent rulings, this Court should accept Judge Hedges' ruling in the New Jersey Action, and likewise reject ICI's challenge to jurisdiction and venue in New Jersey.

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A. **General Jurisdiction Exists Over ICI in New Jersey.**

To assert "general" jurisdiction, ICI's contacts with New Jersey must be "continuous and systematic" so that ICI could expect to be haled into court in New Jersey. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414-16 & 414 n. 9 (1984); Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987). [See Open. Br. at 13-14 (and cases cited therein).] ICI does not deny any of the myriad facts alleged by MH showing ICI's numerous contacts with MH in New Jersey continuously over the last decade under the parties' Marketing Alliance Agreement, or its 40 visits to MH's New Jersey offices. [Cocoran Decl., ¶¶ 4-5, 10-4; Little Decl., ¶¶ 4-16.] Indeed, ICI admits that it "had a previous business relationship with MH" located in New Jersey. [Oppos. Br. at 2; Declaration of Debra Kamys ("Kamys Decl.") at ¶ 3.] Nor does ICI deny that it agreed to be haled into court in New Jersey under the Marketing Alliance Agreement, which explicitly provided that any disputes related to such Agreement could be arbitrated in New Jersey.[3] [Corcoran Decl., ¶ 5, Exh. A thereto at ¶¶ 11, 15.] In fact, ICI readily admits that it not only "has done business with MH in the past, [but] still conducts some business with MH," which is located in New Jersey. [Oppos. Br. at 8, emphasis added.] By continuing its business with MH, ICI sustains an ongoing pattern of purposefully selling goods and services in New Jersey. In light of this pervasive course of conduct, ICI can not now claim that being haled into court in New Jersey is unexpected or unreasonable. [See cases cited in Open. Br. at 13-14.]

ICI's argues that its contacts with MH somehow are not contacts with New Jersey under a jurisdictional analysis because ICI provides web-based services. [Oppos. Br. at 8.] Based on this bizarre theory, ICI thereby claims that it "does not sell products within the state of New Jersey," despite admitting that it continues to do business with and sell services to MH. [Oppos. Br. at 8.] Thus, under ICI's novel reasoning, although ICI may contact MH employees, seek and receive

[3] ICI erroneously argues that the now terminated Marketing Alliance Agreement is not relevant to the jurisdictional analysis of ICI's contacts in New Jersey. [Oppos. Br. at 8.] While such Agreement may not be relevant for evaluating "specific" jurisdiction over ICI in New Jersey, ICI's contacts with the New Jersey forum independent of the present dispute are certainly germane to whether "general" jurisdiction can be asserted against ICI and directly contradict ICI's claim that litigating in New Jersey would present an extreme hardship (since ICI had previously volunteered to participate in dispute resolution in New Jersey). See, Open. Brief at 13-14.

payments from a New Jersey company, it somehow does not sell products and services to New Jersey. ICI has cited no authority supporting its creative concept that a party selling web-based services is automatically immune from jurisdiction in any forum in which it does business.

B. Specific Jurisdiction Exists over ICI in New Jersey.

Specific jurisdiction may also be asserted over ICI because it purposefully directed its activities to New Jersey and had particular contacts with New Jersey related to the present claims. [See Open. Br. at 14-15.] ICI approached MH, a New Jersey resident, to discuss a possible acquisition, and continues to do business with MH. [Compl., Exh. A at p.1; Corcoran Decl., ¶ 14; Oppos. Br. at 8.] As part of considering the potential acquisition deal, the parties agreed that the exchange and use of their respective proprietary information would be governed by New Jersey law. [Little Decl., ¶ 5 and Exh. A (Nondisclosure Agreement).] ICI does not dispute the numerous communications it sent to MH's New Jersey headquarters. [Little Decl., ¶¶ 5-16 and Exh. C; Opp. Br. at 7.] Further, ICI confirms that it made at least one in-person visit to MH's New Jersey office in connection with the present dispute. Id. Even a single contact with the forum state can support jurisdiction where the cause of action relates to the one purposeful contact. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987). See also Bourassa v. Desrochers, 938 F.2d 1056 (9th Cir. 1991) (a single phone call to California was a sufficient act to impose jurisdiction); Brown v. Flowers Industries, Inc., 688 F.2d 328, 332-33 (5th Cir. 1982) (a single telephone call to Mississippi was sufficient for personal jurisdiction where defendant knew the call was directed to Mississippi).

For the foregoing reasons, and should this Court not adopt the ruling of the New Jersey Court on the jurisdictional issue, the Court should conclude that ICI is subject to jurisdiction in New Jersey.

IV. IN BALANCING THE CONSIDERATIONS FOR TRANSFER UNDER 28 U.S.C. SECTION 1404(a), NEW JERSEY IS THE MOST CONVENIENT FORUM.

A. On Balance, the Convenience of Witnesses and to Documents Favors Transfer to New Jersey.

Section 1404(a) empowers the Court to transfer an action only to a district "where it might have been brought" as determined by U.S.C. §1391.[4] The Supreme Court has interpreted Section

[4] Under 28 U.S.C. §1391, a case may be brought in a judicial district where (1) the defendant

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1404(a) to require that the transferee venue must have been appropriate at the time the case was originally filed. Hoffman v. Blaski, 363 U.S. 335, 343 (1960); Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970). As such, because none of the underlying facts giving rise to the present claims occurred in California, ICI must show that it resided in California when the earlier New Jersey action was filed.[5] [Little Decl., ¶ 25 ("Absolutely nothing related to this case took place in California – not one phone call, not one letter, not one e-mail, not one personal visit").]

The timing and validity of ICI's alleged California presence is uncertain. Although Ms. Kamys claims that ICI moved its "principal place of business" to California in "early July," prior to Reed Elsevier's filing of its complaint in New Jersey on July 18, 2005, Ms. Kamys alleges no facts to support this statement. [Kamys Decl., ¶ 8.] Rather, Ms. Kamys ambiguously alleges that ICI's move to California "is reflected" in the Business Certificate dated August 23, 2005, issued more than one month after the New Jersey Action was filed, and several weeks after the present action was filed.[6] [Kamys Decl., ¶ 8 and Exh. A.] Though Ms. Kamys claims that ICI's principal place of business moved to California in "early July," ICI's website continues to show only a Portland, Oregon address and makes no mention of a California office. [See Suppl. Marinez Decl., ¶ 3-4; Suppl. Req. Jud. Notice, Exh. D.] Similarly, by October 14, 2005, there was still no telephone number listing for Inherent or Inherent.com in San Francisco. [Id.] Undoubtedly, any legitimate business would have a myriad of documents reflecting the commencement of its operations at a particular location. Because Ms. Kamys' declaration is inconsistent with other facts, the Court

resides, (2) a substantial part of the events giving rise to the claim occurred, or (3) any defendant is subject to personal jurisdiction at the time the action was commenced. See 28 U.S.C. § 1391(a). A corporate defendant resides in any district in which it is subject to personal jurisdiction at the time the action commenced. See 28 U.S.C. § 1391(c).

[5] Because the New Jersey Action which was filed on July 18, 2005, before the present action, and ICI has also filed a motion transfer the New Jersey Action to California, ICI must show that it resided in California on July 18, 2005, when the earlier New Jersey Action was filed, to support its arguments in both actions that this dispute could have been venued in California.

[6] The prior declaration submitted by Ms. Kamys in the New Jersey Action suggests that ICI was just establishing its California presence by August 18, 2005, if at all. [See Suppl. Req. Jud. Notice, Exh. A (declaration of Debra Kamys dated August 18, 2005)]. Ms. Kamys' declaration executed on August 18, 2005, in Portland, Oregon, states that "[c]urrently ICI has moved its principal place of business" to California and that "[a]ll of its information and capital is to be located there [California]. (emphasis added)" Not only does Ms. Kamys' earlier declaration suggests that she was still located in Oregon as of August 18, 2005, but that ICI's documents and alleged move to California was still in progress at that time. Id.

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may disregard or discount the statements therein (as did the New Jersey Court). See Williams v. Woodford, 384 F.3d 567, 609 (9th Cir. 2002) (court may give little weight to witness declarations that are not very credible); Cohen v. Kurtzman, 45 F. Supp. 2d 423, 432 (D.N.J 1999) (disregarding conclusory and argumentative portions of affidavit).

The Business Certificate also raises questions as to the legitimacy of ICI's alleged relocation to California. [Kamys Decl., ¶ 8 and Exh. A.] ICI's mailing address under the Business Certificate, "781 Beach Street, Suite 333, San Francisco, California," is the business address of ICI's California counsel, the Catalano law firm.[7] [Kamys Decl., ¶ 8 and Exh. A.] Because ICI's California business address is its own lawyer's address, it seems that ICI may be attempting to artificially manufacture a business presence in California for the purpose of enhancing its arguments to keep this case close to ICI's California counsel. The New Jersey district court had "sufficient questions with regard to the affidavits submitted by defendants [ICI]" to deny *pro hac vice* admission in New Jersey to ICI's counsel, the Catalano firm, and to later deny ICI's motion to transfer the case to California. [See Suppl. Req. Jud. Notice, Exhs. C and E.] Unfortunately for ICI, the convenience of plaintiff's counsel is not a factor to be considered in determining whether a particular locale is a convenient forum. Fabus Corp. v. Asiana Express Corp., 2001 U.S. Dist. LEXIS 2568 at *6 (N.D. Cal. 2001). Thus, ICI falls far short of alleging credible facts that it was located in California at the time first-filed New Jersey Action was brought on July 18, 2005.

Even assuming, arguendo, that both Ms. Kamys and her husband were located in California on July 18, 2005, the convenience of most of the likely witnesses in the action favors transfer to New Jersey. See A. J. Industries, Inc. v. United States Dist. Court for Cent. Dist., 503 F.2d 384, 387 (9th Cir. 1974) ("...the determination of transferability must still be made as of the time of filing of the action in the transferor district."); Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 988 (E.D.N.Y. 1991) (convenience of the witnesses is one of the most important considerations in considering transfer of an action). While ICI claims to have two witnesses in California, MH has identified at least 12 witnesses who reside in New Jersey. [Oppos. Br. at 9; Little Decl., ¶ 18-19.]

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[7] It is MH's understanding that Patrick Catalano and Jannik Catalano are Ms. Kamys' uncle and cousin by marriage, respectively.

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Although Ms. Kamys identifies seven other witnesses located in Oregon and one in Indiana, these witnesses would nevertheless need to travel to either California or New Jersey. [Kamys Decl., ¶ 15.] Rather than have Ms. Kamys and her husband travel to New Jersey, ICI would have MH bring at least 12 witnesses to California. ICI was apparently willing to travel to New Jersey when they wanted MH's business, but now claim that traveling to New Jersey in this case is unreasonable and unexpected. ICI cannot have it both ways.

Because many of the material events occurred in New Jersey, the sources of proof and access to documents favors New Jersey, as well. MH has a large number of documents relevant to the proposed acquisition transaction, but would also have access to proof related to ICI's allegation that MH misused the alleged "trade secret" to create websites for other law firms at its New Jersey office. [Compl., ¶ 15; Little Decl., ¶ 21-24.]

B. New Jersey Is In Close Proximity to the Operative Events.

ICI's opposition does not dispute the many facts that show New Jersey's close proximity to the many events giving rise to the present claims. See Open. Br. at 18; Little Decl., ¶ 7-9, 18-19; Corcoran Decl., ¶ 10-14.] ICI cannot ignore that none of the underlying events in this action occurred in California. [Little Decl., ¶ 25; Corcoran Decl., ¶ 16.] ICI has failed to demonstrate that this factor favors litigating this case in California.

C. Consolidation of ICI's Claims, Some or All of Which are Governed by New Jersey Law, Favor Transfer to New Jersey.

ICI's tort claim for fraud, alleging that Defendants somehow misused ICI's purported "trade secrets" transmitted by ICI under the Nondisclosure Agreement, is governed by New Jersey law due to an express choice of law provision (and defendants contend that New Jersey law governs the other claims as well). [See Oppos. Br. at 6.] The applicability of New Jersey law to some, if not all, of ICI's claims favors transfer of this action to the District of New Jersey. Laumann Mfg. Corp. v. Castings USA, Inc., 913 F. Supp. 712, 721-722 (E.D.N.Y. 1996) (court whose law will govern the case is favored in consideration of a motion to transfer); Van Dusen v. Barrack, 376 U.S. 612, 645, 84 S.Ct. 805 (1964) (state where federal judges are more familiar with the governing law is a factor to be considered in a transfer motion). Where ICI can assert its claims

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by way of counterclaim in the New Jersey Action, and New Jersey law would likely apply to at least some, if not all, of the present claims, this factor favors transfer to New Jersey.

D. Plaintiff's Choice of Forum Should be Given Little Deference.

ICI's chosen forum should be given little weight where "the operative facts have not occurred within the forum." See Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987) (if the parties "contacts with the forum" and "operative facts have not occurred within the forum," plaintiff's choice of forum is entitled to only minimal consideration); cert. denied, 485 U.S. 933 (1988). Retaining jurisdiction here would serve neither the public's interest, nor in the interests of justice. Neither party will be able to compel the attendance of key witnesses, who principally reside in New Jersey or Oregon. New Jersey has a strong interest in this case because many of the events giving rise to the present claims occurred in New Jersey. Moreover, where (like here) the plaintiff appears to be forum shopping in selecting venue, the plaintiff's choice receives little or no deference in a transfer analysis. See Reiffin v. Microsoft Corp., 104 F. Supp. 2d 48, 54 n.12 (D.C. 2000) (plaintiffs chosen forum will be accorded little deference where plaintiff engaged in forum shopping); Royal Queentex Enterprises, Inc. v. Sara Lee Corp., 2000 WL 246599 *3 (N.D. Cal. 2000).

E. Comparative Financial Resources of the Parties is not the Dispositive Factor in Considering Transfer of the Action.

Although ICI attempts to claim financial hardship, the comparative financial resources of the parties is not the dispositive factor in evaluating whether to transfer an action. Relative financial resources is but one factor in the transfer analysis and is not the overriding fact in the balancing of competing interests. See Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989 (D.N.Y. 1991) (relative means of individual plaintiff and defendant corporation is accorded "little or no significance" where showing of hardship insufficient); United States ex rel. Swan v. Covenant Care, Inc., 1999 U.S. Dist. LEXIS 15287, 9-10 (N.D. Cal. 1999) ("Although defendants have greater financial means than do plaintiffs, this factor does not favor allowing the action to remain in [plaintiff's forum choice]…"). Moreover, ICI's claims of financial hardship are questionable given that ICI previously agreed to dispute resolution in New Jersey and has collected

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$1,000,000 from MH since 2000. In addition, ICI continues to be an active company, admittedly doing business with MH in New Jersey and presumably other companies. [Oppos. Br. at 8; Cocoran Decl., ¶¶ 8-9.] ICI has put forth no factual basis to support that a transfer to New Jersey poses a severe financial hardship.

Because ICI's other witnesses reside outside California, significant travel expenses would be incurred by ICI even if this action was venued in California. ICI essentially argues that the added travel expenses incurred by Ms. Kamys and her husband alone would create an excessive financial hardship on ICI. ICI has asserted no facts to support this conclusion.[8] If this case remains in California, ICI would have to pay for its counsel to fly to Oregon and to New Jersey to conduct and defend numerous depositions. Those flights would far outnumber the amount of trips to New Jersey that ICI's representatives would be required to make in order to participate in the New Jersey action, where presumably ICI would be represented by local New Jersey counsel. Even the cases ICI cites in support of its opposition to transfer demonstrate that the interests of justice favor transfer to New Jersey. For example, in Chrysler Capital Corp. v. Woehling, 663 F. Supp. 478, 482 (D. DE. 1987), the court granted defendant Woehling's motion to transfer the action to the District of New Jersey, where he resided, despite the fact that defendant Woehling had consented to personal jurisdiction in Delaware. In granting the transfer, the court noted that "when the plaintiff chooses a forum which has no connection to himself or the subject matter of the suit, and is thus not his 'home turf,' the burden on the defendant is reduced and it is easier for the defendant to show that the balance of convenience favors transfer." The court held that plaintiff Chrysler had no real connection with Delaware, notwithstanding that it was the state of

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8 In its opposition, ICI also alleges that MH's termination of the purchase negotiations was somehow unwarranted and that ICI was damaged by its inability to "sell any products or services" to the law firm community based on the Letter of Interest. [See Oppos. Br. at 4 and 8.] These attempts to argue the merits of this dispute are not relevant in the present motion to dismiss or to transfer venue. Moreover, ICI blatantly mischaracterizes the Letter of Interest which did not prohibit ICI from selling products or services to the law community, but rather, limited ICI's right to sell the "Business" or the "Company" until the purchase transaction was consummated or terminated. [See Letter of Interest, Little Decl., Exh. C at 4-5 ("...from the date of this letter...until a transaction is consummated or terminated, or July 31, 2005, whichever first occurs, the Company...will cease all solicitation of other offers for the disposition by any means of the Business, the Company or any of its shares...).] The Letter of Interest says nothing about prohibiting ICI from selling its services to the legal community.

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incorporation. Further, the court noted that because the documents, the witnesses, and the events occurred or were located in either New Jersey or Connecticut – but not Delaware – the defendant could more easily show that the balance of convenience favored transfer.[9]

V. ICI'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY UNDER FRCP 9(b)

In its Opposition, ICI fails to show that its fraud claim is pleaded with sufficient particularity. [See Oppos. Br. at 9-10.] Accordingly, for the reasons stated in Defendants' opening memorandum, ICI's complaint should be dismissed on this basis. [See Defs. Open. Br. at 21-22.]

VI. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss this action based on the "first to file" doctrine should be granted, or in the alternative, this action should be transferred to the District of New Jersey.

DATED: October 17, 2005

SHARTSIS FRIESE LLP

By: */s/ Zesara C. Chan*
ZESARA C. CHAN

Attorneys for Defendants

MARTINDALE-HUBBELL AND LEXIS/NEXIS, divisions of REED ELSEVIER, INC.

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[9] Similarly, in Hernandez v. Graebel Van Lines, 761 F. Supp. 983, the court granted defendant's motion to transfer. The court noted that "where the transactions or facts giving rise to the action have no material relation or significant connection to the plaintiff's chosen forum, then the plaintiff's choice is not accorded the same 'great weight' and in fact is given reduced significance." Id. at 990. Finally, in Schmidt v. Am. Inst. of Physics, 322 F. Supp. 2d 28 (D.D.C. 2004), the court granted defendant's motion to transfer notwithstanding that plaintiff resided in its forum choice. The court ruled that deference to plaintiff's choice of forum "is mitigated…where the plaintiff's choice of forum has no meaningful ties to the controversy." Id. at 33. Here, too, ICI fails to show that this case has any meaningful ties to California.

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ONE MARITIME PLAZA
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SAN FRANCISCO, CALIFORNIA 94111-3598